

**U.S. Department of Justice**

National Security Division

Washington, D.C. 20530

January 4, 2019

Mr. Mark Langer, Clerk
United States Court of Appeals for the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, NW
Washington, DC 20001

Re: *In re: Abd Al-Rahim Hussein Muhammed Al-Nashiri*, No. 18-1279
Letter under Fed. R. App. P. 28(j)

Dear Mr. Langer:

This matter is a petition for a writ of mandamus vacating orders issued by the military judge who formerly presided over petitioner's military commission case. Petitioner contends that the judge should have disqualified himself when he applied for a post-retirement position as an immigration judge and that his failure to do so requires vacatur of his orders. In response, the government has contended that, because petitioner never raised this claim in the military commission, this Court should send the case back to the military commission for factual findings and an initial ruling by the new military judge, Air Force Colonel Shelly W. Schools.

On December 22, 2018, petitioner requested that military commission prosecutors search for and provide petitioner with any information in the government's possession indicating that Judge Schools had also applied for a post-retirement immigration judge position. Before receiving this request, the government attorneys litigating this case were unaware that Judge Schools was considering retirement or any post-retirement position. After requesting information from the relevant agency (the Executive Office of Immigration Review (EOIR) in the Justice Department), the government confirmed to petitioner that Judge Schools has applied for and has accepted a post-retirement immigration judge position. Prosecution Resp. to Discovery Request, *United States v. Al Nashiri* (Mil. Comm'n Jan. 4, 2019) (attached). The government will provide all responsive, relevant, and discoverable documentation or information to petitioner's counsel after it is cleared for release by EOIR.

Because the available information indicates that Judge Schools intends to retire from the military in the relatively near future and she has not issued any rulings in petitioner's case or presided over any of its proceedings, the government would not oppose a defense request for reassignment of this case to a new military judge when military commission proceedings resume. Petitioner could then present his arguments for vacatur to that military judge for findings and an

initial ruling. If that ruling is adverse to petitioner, he could then seek any available appellate remedies after having first raised his claim at the trial level, as the Military Commissions Act requires. *See* 10 U.S.C. § 950g.

Sincerely,

/s/ Joseph F. Palmer

Joseph F. Palmer

Danielle S. Tarin

Counsel for the United States

Attachment

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

ABD AL RAHIM HUSSAYN
MUHAMMAD AL NASHIRI

**Prosecution Response to
Defense Request for Discovery**

4 January 2019

1. The Prosecution has received your request for discovery dated 22 December 2018 (enclosed) and sent it to the appropriate authorities.¹
2. The Prosecution will provide all responsive, relevant, and discoverable documents and information to you as they become available. At this time, the Prosecution possesses no such documents or information other than that set forth in Paragraph 3 of this response.
3. The Prosecution's initial inquiry with the Executive Office of Immigration Review ("EOIR") of the U.S. Department of Justice ("DOJ") has confirmed that the presiding Military Judge in the military commission case of *United States v. Al Nashiri*—U.S. Air Force Colonel Shelly W. Schools—sought and accepted an offer of employment as an immigration judge. She applied for the position in April 2018, accepted an offer of employment on or about September 2018, was temporarily appointed on 15 October 2018, and has an anticipated start date of 1 August 2019. At this time, neither the Prosecution nor EOIR can confirm whether she has an anticipated date of retirement from the Air Force. However, the Prosecution has sought that information and will provide it to you when it becomes available.
4. The Prosecution hereby notifies you of its intent not to oppose a Defense request to replace Judge Schools from presiding in the *Al Nashiri* military commission if it is determined that her request for retirement has been approved.



John B. Wells, Colonel, U.S. Army
Managing Assistant Trial Counsel

CC: Chief Trial Judge for Military Commissions c/o Military Commissions Trial Judiciary;
The Office of the Judge Advocate General, U.S. Air Force

¹ In forwarding your discovery request, the Prosecution does not concede that the assertions and arguments raised in your request are accurate, meritorious, or entitle you to the requested discovery. The Prosecution maintains that the Department of Justice is not a "party" to the Accused's prosecution by military commission and that it does not create an appearance of partiality and is not otherwise improper for a presiding military judge to seek employment with the Department of Justice as an immigration judge. See generally Br. of the United States in Opp., *In re Al-Nashiri*, No. 18-1279 (D.C. Cir. Nov. 13, 2018), ECF No. 1759771; Appellant's Opp. to Appellee's Mot. for Leave To File and Mot. To Vacate the Rulings of the Military Judge and To Compel Discovery of Evidence Relating to Disqualification of the Military Judge and His Successor, *United States v. Al Nashiri*, No. 18-002 (U.S.C.M.C.R. Sept. 18, 2018).



DEPARTMENT OF DEFENSE
MILITARY COMMISSIONS DEFENSE ORGANIZATION
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

22 December 2018

MEMORANDUM FOR Trial Counsel

From: LT Alaric A. Piette, JAGC, USN, Detailed Defense Counsel

SUBJECT: DEFENSE REQUEST FOR DISCOVERY OF AND PRESERVATION OF MATERIALS AND COMMUNICATIONS REGARDING THE APPLICATION FOR AND EMPLOYMENT OF COLONEL SHELLY SCHOOLS, USAF, AS AN IMMIGRATION JUDGE

1. Mr. Al-Nashiri is currently facing charges resulting from his alleged involvement in both al-Qaeda and its alleged attack on the USS COLE (DDG-67). The Convening Authority for Military Commissions referred the charges capitally, and Mr. Al-Nashiri faces a potential death sentence if convicted of the alleged offenses. Pursuant to 10 U.S.C. § 949j, Rules for Military Commission 701(c)(1) and 701(e)(1)(C), and the Due Process Clause of the United States Constitution, Mr. Al-Nashiri, through counsel, requests the government furnish all documents and/or information and/or communications (in hardcopy or digital) in its possession, or known or discoverable by the government, which are material to the preparation of Mr. Al-Nashiri's defense. This request (and all future and past requests) include a request that all material currently (or originally) in digital form be produced in the raw digital form without alteration to the content or metadata.

2. On information and belief, the Defense understands that the Department of Justice, a party to this case, has surreptitiously hired a *second* military judge in Mr. Al-Nashiri's capital military commission. This time, the Executive Office for Immigration Review (EOIR) appears to have hired Colonel Shelly Schools, USAF, who will soon join Colonel Vance Spath, USAF (ret.) as an immigration judge. EOIR is "an agency within the Department of Justice. Under delegated authority from the Attorney General, immigration judges and the Board of Immigration Appeals interpret and adjudicate immigration cases according to United States immigration laws."¹ In light of ongoing litigation before the Court of Appeals for the District of Columbia Circuit, you are well aware this raises good faith concerns over whether Judge Schools operated under an actual or apparent disqualifying conflict of interest while detailed to this case. *Pepsico, Inc. v. McMillen*, 764 F. 2d 458 (7th Cir. 1985).

3. In light of the facts stated above, the defense requests the following be preserved and provided as discovery:

¹ <https://www.justice.gov/eoir/pr/eoir-announces-new-administrative-law-judge>

- a. Any and all emails and/or files and/or data concerning the pursuit of the immigration judge position by Colonel Schools. This request includes the request for immediate seizure, search, and preservation of Colonel Schools' government computers, phones, email accounts, internet history, to determine whether any of this relevant material of her pursuit of this position is present on government-owned devices.
 - b. Any and all communications and files between any member of the DOJ (or other government agencies), any attorneys general, member of the prosecution, convening authority's office, and/or the trial judiciary regarding Colonel Schools' pursuit of the immigration judge position.
 - c. Any application, records, communications, notes etc... regarding Colonel Schools' application process for this immigration judge position held by any agency.
 - d. Any other material not specifically mentioned regarding and relevant to Colonel Schools' pursuit of the immigration judge position.
4. This also serves a preservation request for the materials requested above. Please take immediate steps to locate and preserve the material regardless of the government's position regarding the discoverability of the requested material. Further, this is a request for all material currently in digital or electronic form to be produced or preserved in the original "raw" format.
5. Given that oral argument is scheduled in *In re Al-Nashiri*, No. 18-1279 (D.C. Cir. 2018) on 22 January 2018, and further considering the government's position that this case be remanded to Colonel Schools who may very soon be employed by EOIR, Mr. Al-Nashiri requests that you respond to this discovery request by 11 January 2019.
6. Thank you for your prompt attention to this matter. If you have any questions about this request or would like to discuss it further, please feel free to contact me.

Very Respectfully Submitted,

//s//

A.A.PIETTE

LT, JAGC, USN

Detailed Defense Counsel

The above discovery request was delivered to trial counsel via email on 22 December 2018.